

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KYLE LEE PAYMENT,

Plaintiff,

v.

JEFFREY WALKER,

Defendant.

CASE NO. 13-5249 RJB - JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. magistrate Judge J. Richard Creatura. Dkt. 4. The Court has considered the Report and Recommendation, objections and the remaining record.

The facts are contained in the Report and Recommendation and are adopted here. Dkt. 4, at 1-2. The Report and Recommendation recommends the case be dismissed without prejudice and the Plaintiff's application for in forma pauperis status be denied because the case is barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Dkt. 4.

The Report and Recommendation should be adopted and the case dismissed without prejudice. Plaintiff argues that he is making an independent First Amendment claim under § 1983, not just habeas claims, and seeks damages for that claim. Dkt. 5. Plaintiff's argument is misplaced. Plaintiff's First Amendment § 1983 claim is barred under *Heck* because success on that claim "would necessarily imply or demonstrate the invalidity of the earlier conviction or sentence. . . ." *Beets v. County of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012)(*internal quotation omitted*). In forma pauperis status should be denied this Plaintiff.

It is **ORDERED** that:

- The Report and Recommendation (Dkt. 4) **IS ADOPTED**;
- Plaintiff's application to proceed in forma pauperis (Dkt. 1) **IS DENIED**;
- The case is **DISMISSED WITHOUT PREJUDICE** as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge Creatura, all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 13th day of May, 2013.



ROBERT J. BRYAN
United States District Judge